

ORIGINAL**PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY****FILED**Name Sunday, Roman Sr.
(Last) (First) (Initial)

MAR - 4 2008

Prisoner Number V-11338RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLANDInstitutional Address P.O. BOX 4000VACAVILLE, CA 95696-4000 1-106U**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**Roman Sunday, Sr.,Petitioner,

vs.

D.K. SISTO, Warden,Respondent.Case No. C-07-5308 SBA (PR)
(To be provided by the clerk of court)**PETITION FOR A WRIT
OF HABEAS CORPUS**First Amended Petition

(Enter the full name of respondent(s) or jailor in this action)

Read Comments Carefully Before Filling In**When and Where to File**

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

3. Did you have any of the following?

Arrestment: Yes XX No

Preliminary Hearing: Yes XX No

Motion to Suppress: Yes XX No

4. How did you plead?

Guilty _____ Not Guilty ^{XX} _____ Nolo Contendere _____

Any other plea (specify) _____

5. If you went to trial, what kind of trial did you have?

Jury XX Judge alone _____ Judge alone on a transcript _____

6. Did you testify at your trial? Yes _____ No XX

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes XX No

(b) Preliminary hearing Yes XX No

(c) Time of plea Yes _____ No _____

(d) Trial Yes XX No

(e) Sentencing Yes XX No

(f) Appeal Yes XX No

(g) Other post-conviction proceeding Yes XX No

8. Did you appeal your conviction? Yes XX No

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes XX No

Year: 2005 Result: Judgment Affirmed. #(A104520).

Supreme Court of California Yes XX No

Year: 2005 Result: Denied, See Exh. A (#S135861)

Any other court Yes XX No

Year: 2007 Result: Denied, See Exh. A; (#S152252)

(b) If you appealed, were the grounds the same as those that you are raising in this

petition? Yes XX No

(c) Was there an opinion? Yes XX No

(d) Did you seek permission to file a late appeal under Rule 31(a)?
Yes No XX

If you did, give the name of the court and the result:

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes XX No

[Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. §§ 2244(b).]

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court: Contra Costa County Superior Court

Type of Proceeding: "Motion for New Trial"

Grounds raised (Be brief but specific):

a. Trial Counsel's conflict of interest

b. _____

c. _____

d. _____

Result: denied Date of Result: 9/12/03

II. Name of Court: Contra Costa County Superior Court

Type of Proceeding: Habeas Corpus Petition

Grounds raised (Be brief but specific):

1 a. Newly acquired evidence/Miscarriage of Justice

2 b. Ineffective Assistance of trial Counsel

3 c. _____

4 d. _____

5 Result: Denied Date of Result: 12/21/06

6 III. Name of Court: California Court of Appeals Div Five

7 Type of Proceeding: Writ of Habeas Corpus.

8 Grounds raised (Be brief but specific):

9 a. Newly acquired evidence/misscarriage of justice

10 b. Ineffective assistance of trial counsel.

11 c. _____

12 d. _____

13 Result: Denied Date of Result: 4/18/07

14 IV. Name of Court: California Supreme Court

15 Type of Proceeding: Writ of Habeas Corpus

16 Grounds raised (Be brief but specific):

17 a. Newly acquired evidence/misscarriage of justice

18 b. Ineffective assistance of trail counsel.

19 c. _____

20 d. _____

21 Result: denied See Exh. A infra Date of Result: 9/12/07

22 (b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

23 Yes _____ No X

24 Name and location of court: _____

25 B. GROUNDS FOR RELIEF

26 State briefly every reason that you believe you are being confined unlawfully. Give facts to

27 support each claim. For example, what legal right or privilege were you denied? What happened?

28 Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

CLAIM ONE: PETITIONER'S CONVICTION FOR MURDER AND KIDNAPPING WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN CONTRAVENTION OF PETITIONER'S DUE PROCESS RIGHTS TO THE UNITED STATES CONSTITUTION.

Supporting Facts: The historical record adduces insubstantial "independent" evidence to sustain guilty verdicts. It is well established an accomplice cannot corroborate another accomplice's testimony. There must be independent evidence standing alone i.e., inculpatory evidence [physical or other witnesses] that is the nexus to the accomplice testimony that evinces the accused committed the substantive offense.

The state court opined, multifarious examples of independent corroboration: (1) petitioner spoke of Blair in the past tense; (2) petitioner asserted Roman Jr. never left home after 10:00 p.m. and interrupted Robert Moore [Blair's Grandfather] while he was inquiring about Blair's whereabouts; (3) petitioner spoke with the police about being displeased that crimes were being committed against Roman Jr. and his own residence. Ostensibly, this evidence linked petitioner to the killers and the opportunity to participate.

The substantial evidence rule demands evidence that is credible, that of solid value. Surmise and conjecture do not rise to that level. Moreover, none of the reasons posited connect petitioner to the crime, only to the accomplices. Notwithstanding, Roman Jr. is petitioner's son and Shelton Eaves one of Roman's friends. Clearly, an "unreasonable" decision in light of evidence presented to the state-court, requiring reversal. [28 U.S.C. 2254(d)(2)]

CLAIM TWO: PETITIONER WAS DENIED HIS GUARANTEED RIGHT TO CONFLICT FREE COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Supporting Facts: Subsequent to verdict petitioner lodged a motion for new trial. Newly appointed substitute counsel proffered inter alia, petitioner was denied his Sixth Amendment right to counsel predicated on his trial attorney had previously represented petitioner's son, [Roman Jr.] a key prosecution witness, on the same charge for which petitioner was tried and convicted.) (CT 790 et. seq.) The trial court conducted an evidentiary hearing. We can readily glean petitioner's attorney [William Daley] worked on Roman Jr's. case in the absence of Linda Fullerton, Roman Jr's. attorney (RT 1386-87). Daley met with Roman Jr. on several occasions discussing various aspects of the case. (RT 1356-1363.) Shortly, thereafter Daley notified Fullerton, that he had been retained to represent her client. (RT 1443-44.)

The defense proffered Jeff Bradley, a Contra Costa County public defender since 1974. He elucidated the "conflict of interest" most affirmatively, averring the cross-examination of Roman Jr. seemed "to be no effort to discredit Junior at all." (RT 1626). A thorough cross-examination would have violated attorney-client privilege. (RT 1664).

Following additional briefing the Court ruled petitioner was not disadvantaged in anyway. (RT 1720-21).

An actual conflict of interest results if the defense attorney was required to make a choice of advancing his own interest to the detriment of his client's interest. An adverse effect occurs when an attorney's lapse in representation contrary to the Defendant's interest. Prejudice is presumed.

Petitioner asserts the state-court determination is an "unreasonable" or "contrary" application of federal law as determined by the United States Supreme Court, requiring reversal or in the alternative a federal evidentiary hearing. [28 U.S.C. §2254(d)(1),(e)(2)].

CLAIM THREE: PETITIONER'S RIGHT TO DUE PROCESS, A FAIR TRIAL AND TO AN IMPARTIAL JURY WAS SEVERELY ABRIDGED BY THE PROSECUTOR'S REPEATED MISCONDUCT CONTUMACIOUS TO THE UNITED STATES CONSTITUTION AMENDMENT FOURTEEN.

Supporting Facts: A) During trial the prosecutor, over the court's antecedent ruling and counsel's objection[s], repeatedly referred to inadmissible prior crime evidence prejudicial to petitioner. In limine, it was decided that petitioner's prior convictions for robbery from 1971 or earlier would not be put before the jury. (RT 783). Only a violation of Vehicle Code section 10851, would be allowed, with the caveat petitioner testified. (RT 785). However, during the testimony of defense character witness Frank Kellom the prosecutor asked, viz, did you know petitioner had gone to prison for a robbery where he stuck a gun in someone's face? (RT 779-800). Counsel belatedly objected and the court limited the prosecution's questioning to the fact of a conviction, no facts of the crime. (RT 800).

Regardless, the prosecutor repeatedly persisted in asking defense character witness[es] prejudicial inadmissible details of the prior robbery from 30 years ago. (RT 802,810). Petitioner suffered prejudice not only bringing forth facts not in evidence it eluded to the prosecutor had access to information they did not.

B) The prosecutor's continued misconduct i.e., using petitioner's past convictions improperly in closing argument

suggesting petitioner lied to Dr. Lerchin about his past. (RT 1262). Impugning petitioner's veracity with inadmissible testimony, now introduced to evidence. The state court determination that this evidence was derived from Dr. Lerchin's testimony belies the historical record.

C) The prosecution during closing argument interposed his personal belief in the reliability of his witness's, stating, "I believe..." The state-court, arrogated its own conjecture inferring what the prosecutor actually meant by stating, "I believe..", i.e., he was speaking for the People. This does not remotely palliate the statement nor does the state court's proffered sophistry. Further attempting to manipulate the claim, the court states vouching is an attempt to bolster the credibility of [a] witness[es] by reference to facts outside the record. That's exactly what the prosecutor did. Inferring he "believed," implied he knew something the jury did not. To opine these words were stricken or an objection sustained, does not ~~alleviate the prosecutor's egregious efforts in sustaining a~~ conviction. Notwithstanding, you cannot unring a bell. The crux of the case was a credibility test. Evidence of petitioner's nefarious past pervaded the trial with unfairness, requiring reversal. [28 U.S.C. §2254(d).]

CLAIM FOUR: PETITIONER WAS DENIED HIS RIGHT TO COUNSEL, UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Supporting Facts: Petitioner's brother testified as a character witness for the defense. The prosecutor asked him various questions concerning petitioner's prior record. Immediately after trial counsel convinced the court to exclude all but-one prior for impeachment purposes, (correlative with prosecutorial

misconduct raised ante.) Although a prosecutor may inquire whether defense witness[es] were aware of a defendant's prior convictions, the court's discretion under Evid. Code §352 to exclude the prior convictions was pellucid. Counsel's failure to timely object severely prejudiced the defense, promulgating to the trier of fact petitioner's sorted past, violent crimes and all, over the course of several decades. Counsel's failure to object cannot be deemed a strategic decision. Counsel's deficient performance under prevailing norms undermined confidence in the verdict, requiring reversal or in the alternative [plenary] evidentiary proceedings. [28 U.S.C. §2254(d),(e)(2)].

CLAIM FIVE: THE CUMULATIVE EFFECT OF THE ERROR[S] INFECTED THE TRIAL WITH UNFAIRNESS, VITIATING DUE PROCESS OF LAW.

Supporting Facts: We must acquiesce in totality of the circumstances i.e., the "substantial" evidence proffered the government's modicum of independent evidence linking petitioner to the crime, correlative with the assignments of error proffered ante, resulted in a fundamentally unfair trial. Trial counsel's limited investigation and cross-examination of Roman Jr.; Counsel's failure to lodge a timely-objection correlative with questioning petitioner's character witness[es]; the government attorney going way beyond the succinct fact of the prior, contumacious to the court's preceding ruling; arguing facts not in evidence, going beyond the record, implying petitioner lied to Dr. Lerchin apposite to the prior [in-admissible] evidence; vouching for the credibility of the government witnesses, stating "...I believe....," clearly an attempt to bolster the accomplices/government witnesses

credibility, with implied knowledge of facts extraneous to the record. In a case where the only percipient testimony is two accomplice's corroborating each other with compulsory testimony correlative with their plea agreement[s], the cumulative errors militated fundamental fairness, requiring reversal under our Constitutional framework of jurisprudence. [28 U.S.C. §2254(d)].

1 List, by name and citation only, any cases that you think are close factually to yours so that they
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning
3 of these cases:
4
5
6

7 Do you have an attorney for this petition? Yes _____ No XX

8 If you do, give the name and address of your attorney:
9 _____

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.
12

13 Executed on February 25, 2008

14 Date

Roman Sunday Jr.

Signature of Petitioner

15
16
17
18
19
20 (Rev. 6/02)

EXHIBIT A

Court of Appeal, First Appellate District, Division Five - No. A104520
S135861

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ROMAN SUNDAY, SR., Defendant and Appellant.

Petition for review DENIED.

**SUPREME COURT
FILED**

DEC 12 2006

Frederick K. Ohlrich Clerk


DEPUTY


Chief Justice

Court of Appeal, First Appellate District, Division Five - No. A104520
S135861

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ROMAN SUNDAY, SR., Defendant and Appellant.

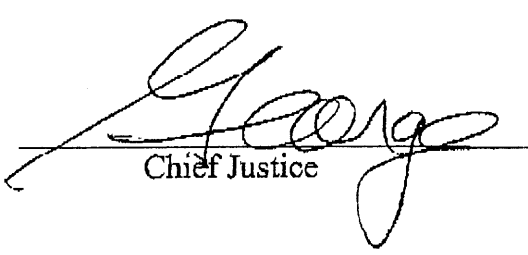
Petition for review DENIED.

SUPREME COURT
FILED

OCT 12 2005

Frederick K. Orllich Clerk


DEPUTY


Chief Justice

S152252

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re ROMAN SUNDAY, SR., on Habeas Corpus

The petition for writ of habeas corpus is denied. (See *In re Swain* (1949) 34 Cal.2d 300, 304; *People v. Duvall* (1995) 9 Cal.4th 464, 474.)

SUPREME COURT
FILED

SEP 12 2007

Frederick K. Ohlson Clerk

Deputy

GEORGE

Chief Justice

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned, hereby declare and state that, I am over the age of eighteen (18) years old and I (am) a party to the within cause of action that on this 1, day of March, 2008, I placed the below named legal documents in the United States Mail:

First Amended Petition for writ of Habeas Corpus

for which are addressed to the below named parties/persons:

- | | |
|---------------------------------|-----------------------------------|
| 1. | 2. |
| United States District Court | DEPARTMENT OF JUSTICE |
| Northern District of California | OFFICE OF THE ATTORNEY GENERAL |
| 450 Golden Gate Avenue | 455 GOLDEN GATE AVE., SUITE 11000 |
| P.O. Box 36060 | SAN FRANCISCO, CA 94102-7004 |
| San Francisco, Ca. 94102 | |
| 3. | 4. |

I, hereby declare under the penalty of perjury of the laws of the State of California, and the United States, that the above certificate of service is true and correct to the best of my knowledge and recollection.

Roman Sunday Jr.
DECLARANT

Case # (if applicable): C-07-5308 SBA(PR)3/1, 20008To: **CLERK OF THE COURT**☐ SUPERIOR COURT☐ COURT OF APPEAL☐ CALIFORNIA SUPREME COURT☒ FEDERAL DISTRICT COURT☐ FEDERAL COURT OF APPEAL☐ U.S. SUPREME COURTFrom: Roman Sunday Sr. #CDC #: V-11338

California State Prison - Solano

Housing: 1/106

P.O. Box 4000

Vacaville, California 95696-4000

Re:

☒ PETITION FOR WRIT OF HABEAS CORPUS☐ PETITION FOR REHEARING/RECONSIDERATION☐ PETITION FOR REVIEW☐ BRIEF ON APPEAL☐ MOTION TO COURT

Case:

☐ IN RE☐ PEOPLE v.☒ OTHER: Sunday v. Sisto

Dear Clerk:

I am presently incarcerated at the California State Prison - Solano, in Vacaville. Due to my incarceration, indigency or minimal funds, and the current policy of the California Department of Corrections as stated in Deputy Director Memorandum 15/04, I cannot provide the required number of copies as required by the Rules of Court.

Therefore, I must respectfully request that the court make the required additional copies and to serve any required copies on other parties as necessary.

Furthermore, please send a conformed copy of the documents back to me as a receipt of filing. I apologize for any inconvenience that this may have caused.

Respectfully submitted,

Roman Sunday Sr.

